

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BOBBY J. HEARTFIELD, SR.

Claimant

VS.

IMPACT DESIGN, INC.

Respondent

AND

HARTFORD CASUALTY INSURANCE COMPANY

Insurance Carrier

Docket No. 1,020,827

ORDER

Respondent appeals the December 17, 2007 Preliminary Decision of Administrative Law Judge Robert H. Foerschler. Claimant was awarded temporary total disability (TTD) compensation after the Administrative Law Judge (ALJ) determined that, while claimant was available for limited duty, no such limited duty was available within claimant's restrictions.

Claimant appeared by his attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Joseph Sean Dumm of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held August 17, 2006, with attachments; the transcript of the Preliminary Hearing held December 14, 2006, with attachments; the transcript of the Preliminary Hearing held July 30, 2007, with attachments; the transcript of the Preliminary Hearing held December 13, 2007, with attachments; and the documents filed of record in this matter.

ISSUES

Respondent raises the following issues in its Application For Review to the Board, arguing the ALJ erred in his jurisdictional and compensability findings as follows:

1. By finding that the claimant is available for work through the prison system.
2. By finding that the claimant is not physically capable in engaging in work currently available to a minimum security inmate.
3. That the claimant is entitled to temporary total disability benefits.
4. That the claimant has an expectation of employment given his status as an inmate in the Kansas Correctional System.
5. The Award appears to be based upon findings contrary to findings previously rendered in prior preliminary hearing decisions.¹

Claimant argues the above listed issues are non-jurisdictional issues on appeal from a preliminary hearing. The ALJ determined, under these circumstances, that claimant is entitled to TTD and ordered same beginning October 11, 2007. Claimant argues that the Board does not have jurisdiction to consider an order granting TTD during an appeal of a preliminary hearing.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Decision should be dismissed and the Decision of the ALJ should remain in full force and effect.

Claimant was an inmate at the Lansing Correctional Facility (Lansing) on December 9, 2004, when he slipped on a slick surface and injured his low back and neck. There is no current dispute that claimant suffered the injury, or that it occurred while claimant was working for respondent in the medium security prison. Claimant has been provided medical treatment under the care of several health care providers, recently coming under the care of board certified physical medicine specialist Vito J. Carabetta, M.D. Claimant has also been paid TTD voluntarily by respondent through May 2, 2006, when he was found to be at maximum medical improvement (MMI). In his report of October 19, 2007, Dr. Carabetta limited claimant to sedentary work

¹ Application For Review at 1-2.

only, lifting 10 to 15 pounds only occasionally. Additionally, at the time of Dr. Carabetta's September 24, 2007 examination of claimant, Dr. Carabetta determined that claimant was no longer at MMI.

On June 30, 2006, claimant was transferred to the minimum security facility at Lansing. This necessitated a move of approximately 1 1/2 miles and also resulted in claimant being no longer qualified to work for respondent, as its only job opportunities were at the medium security facility. While claimant could qualify for a minimum wage job through a work release program while at the minimum security facility, there is no indication in this record whether there are jobs for which claimant would be qualified which would also meet his current temporary sedentary restrictions from Dr. Carabetta.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute and whether the administrative law judge exceeded his or her jurisdiction pursuant to K.S.A. 2007 Supp. 44-551.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?

² K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁴

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁵

The ALJ determined that claimant is entitled to TTD in this matter. Whether a worker satisfies the definition of being temporarily and totally disabled is not an issue over which the Board takes jurisdiction on an appeal from a preliminary decision.

This Board Member finds that the decision of the ALJ is within his jurisdiction to determine and the Board does not have jurisdiction to question that decision at this time in these proceedings.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The Board does not have the jurisdiction to determine claimant's entitlement to TTD on an appeal from a preliminary hearing Order. Therefore, the appeal by respondent in this matter is dismissed and the Preliminary Decision of the ALJ remains in full force and effect.

⁴ K.S.A. 44-534a(a)(2).

⁵ *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

⁶ K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the appeal by respondent in this matter should be dismissed and the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated December 17, 2007, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of March, 2008.

HONORABLE GARY M. KORTE

c: Joseph Seiwert, Attorney for Claimant
Joseph Sean Dumm, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge